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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

UNITED STATES OF AMERICA	)	
	)	No. CR 04-30058-PA
v.	)	
	)	<b>OPINION</b>
JAVIER CONCHAS-ESCALANTE,	)	
	)	
Defendant.	)	
_____	)	

**PANNER, District Judge:**

This opinion further explains my oral ruling that the facts of this case do not support imposing a two-level sentence enhancement under U.S.S.G. § 2D1.1(b)(1) for possessing a firearm in connection with the offense.

The weapon at issue is a .45 caliber semi-automatic handgun found in the home where Defendant resided, though not in his room. Defendant concedes it is his gun. Defendant says he acquired and used the gun exclusively for target practice, as did other members of his family. The government offers no evidence to refute this.

The government concedes it has no evidence the weapon was ever present at any drug sale. All drug transactions took place at other locations. No drugs were found in Defendant's home.

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Nevertheless, the government contends the court must impose the two-level enhancement. In the government's view, it need show nothing more than that the Defendant happened to possess a gun during the time period the offense was committed, without regard to whether there was any connection between the possession of the firearm and the commission of the offense. At that point, the government argues, the burden shifts to the Defendant "to prove that is *clearly improbable* that he possessed the weapon in connection with the offense." Government's Sentencing Memorandum at 2 (emphasis in original). The government reiterated this view during the sentencing hearing.

The government's argument overstates the law. Sentencing Guideline § 2D1.1(b)(1) states:

**(b) Specific Offense Characteristics**

(1) If a dangerous weapon (including a firearm) was possessed, increase by 2 levels.

Note 3 to the Guidelines commentary then explains that:

The adjustment should be applied if the weapon was present, unless it is clearly improbable that the weapon was connected with the offense. For example, the enhancement would not be applied if the defendant, arrested at his residence, had an unloaded hunting rifle in the closet.

In essence, the authors of this Guideline concluded that if the weapon was present when the offense was committed, it is reasonable to infer that the weapon was connected to the offense, unless the Defendant clearly demonstrates otherwise. That is really in the nature of a rebuttable evidentiary presumption.

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To obtain the benefit of the "clearly improbable" standard,

the government must show the weapon was present when the offense was committed. The government has not done so.<sup>1</sup>

The government relies upon the following statement in United States v. Nelson, 222 F.3d 545, 549 (9th Cir. 2000):

In this circuit, once the government demonstrates that a defendant possessed a dangerous weapon, to avoid a sentence enhancement under § 2D1.1(b)(1), the burden of proof is on the defendant to prove that it is "clearly improbable" that he possessed a weapon in connection with the offense.

In Nelson, five guns were found in various locations in the house, along with a large marijuana grow operation. In addition, "[l]oose marijuana, sales records, and drug paraphernalia were found throughout the house." Id. at 547. Since the weapons were present when the offense was committed, the government had met its burden, and the panel correctly applied the "clearly improbable" standard. The panel even cited the "if the weapon was present" qualification, id. at 549, though omitting it from the quotation set out above, presumably because it was not a seriously contested issue. Nelson does not alter the established rule that the "clearly improbable" standard applies only if the government first proves "the weapon was present."

The government also errs by asserting that no connection must be shown between the weapon and the offense. Admittedly, in United States v. Restrepo, 884 F.2d 1294 (9th Cir. 1989), a panel

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<sup>1</sup> The government does argue that a "drug detection dog alerted" in several areas of the house, though no drugs were found there. That is not surprising. Defendant admitted making nine drug sales. During those events, drugs undoubtedly came in contact with his hands, clothing, and perhaps other belongings that were with him. By itself, this is insufficient to show that drugs were stored or sold in his home.

of this Circuit did say that "in applying § 2D1.1(b)(1), the court need not find a *connection* between the firearm and the offense." Id. at 1296 (emphasis in original).

That can't be correct. By definition, this enhancement is for "Specific Offense Characteristics." U.S.S.G. § 2D1.1(b). If the gun has no relationship to the offense, the mere fact that the defendant happens to own a gun is not a specific offense characteristic. Rather, it is a characteristic of the "offender."

As a general rule, Americans may legally own firearms such as the one Defendant possessed.<sup>2</sup> A sentencing guideline that requires the court to automatically punish gun owners more severely than individuals who commit the same crime, but do not own guns--without any showing of a connection between the offense and the gun--would raise serious constitutional concerns. I am not suggesting that the gun must have actively been used in committing the offense. It may be sufficient, for example, that the gun was kept at the place where the crime transpired so it would be available if needed to defend the drugs. However, there must be some nexus between the offense and the weapon.

Furthermore, note 3 to the Guidelines commentary instructs that this "adjustment should be applied if the weapon was present, unless it is clearly improbable **that the weapon was connected with the offense.**" (Emphasis added). The "clearly

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<sup>2</sup> As an illegal alien, Defendant could not lawfully possess a firearm. Nevertheless, this sentencing enhancement applies to all defendants, not just to illegal aliens. Consequently, whether this Defendant was authorized to possess a firearm is not a factor in construing this Guideline.

improbable" standard would be nonsensical if, as the government suggests, there is no requirement in the first place that the gun have any connection to the offense.

In Restrepo, the firearm was present at the scene of the crime. The drug sale took place at Restrepo's home. Additional drugs and drug processing and distribution equipment were found there, along with a large amount of currency and a loaded "automatic pistol." Restrepo, 884 F.2d at 1295. Consequently, the "weapon was present" for purposes of Note 3 of the Guidelines commentary. The panel had no reason to consider, let alone to decide, whether this sentencing enhancement applied in a case where there was no nexus between the weapon and the offense, as those were not the facts in Restrepo.

Also informative is the following passage from Restrepo:

The judge reasonably inferred from the evidence that Restrepo possessed the weapon during the commission of the offense. Several of the offenses charged took place at his residence. Agents found the loaded automatic pistol hidden between the mattress and the box spring of his bed, in the same room as equipment used for drug distribution. They also found drugs in several places in his home.

Id. at 1296.

This discussion would be unnecessary if the Restrepo panel had concluded that no nexus must be shown between the weapon and the offense--that it is enough that the defendant happened to own or possess a weapon during the same time period in which he committed the offense. "[D]uring the commission of the offense" means more than just "the same time period as the offense."

I am satisfied that Restrepo intended to reject only the contention that the gun must actively be employed in the commission of the offense, and does not eliminate the requirement that there be a nexus between the gun and the offense.

The government also relies upon United States v. Stewart, 926 F.2d 899 (9th Cir. 1991), for the proposition that the weapon need not be present at the site of the particular overt act of distribution. A critical fact in Stewart was that the defendant was charged with conspiracy to manufacture, possess and distribute methamphetamine. Id. at 901-02. The location and duration of the offense thus went well beyond the lone overt act of distribution. Id. Defendant Conchas-Escalante is not charged with conspiracy. Stewart also emphasized that the weapon possessed was "a Cobry M-11 9mm. machine gun . . . ." Id. at 902. There was no suggestion that Stewart possessed the machine gun for any legitimate purpose. By contrast, the gun possessed by Defendant Conchas-Escalante is suitable for target shooting and as a self-defense weapon that might legitimately be kept in a home.

Finally, in the cases relied upon by the government, the Circuit was asked to decide whether the district court abused its discretion by imposing the gun enhancement. The Circuit did not hold that it was an abuse of discretion not to impose a gun enhancement under those facts.

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**Conclusion**

The facts of this case do not support imposition of the two-level sentence enhancement under U.S.S.G. § 2D1.1(b)(1).

IT IS SO ORDERED.

DATED this 25 day of July, 2006.

  
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Owen M. Panner  
United States District Judge